

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

DELASK PITTMAN,  
 #58318  
 Plaintiff,

vs.

STATE OF NEVADA, *et al.*,  
 Defendants.

3:10-cv-00262-RCJ-VPC

**ORDER**

This is a civil rights action filed pursuant to 42 U.S.C. § 1983. Plaintiff's application to proceed *in forma pauperis* is granted. (Docket #1). The court now reviews the complaint and plaintiff's motion for the appointment of counsel.

**I. Plaintiff's Motion for Appointment of Counsel**

Plaintiff has filed a motion seeking the appointment of counsel in this case. (Docket #1-3). A litigant in a civil right action does not have a Sixth Amendment right to appointed counsel. *Storseth v. Spellman*, 654 F.2d 1349, 13253 (9<sup>th</sup> Cir. 1981). In very limited circumstances, federal courts are empowered to request an attorney to represent an indigent civil litigant. The circumstances in which a court will make such a request, however, are exceedingly rare, and the court will make the request under only extraordinary circumstances. *United States v. 30.64 Acres of Land*, 795 F.2d 796, 799-800 (9<sup>th</sup> Cir. 1986); *Wilborn v. Escalderon*, 789 F.2d 1328, 1331 (9<sup>th</sup> Cir. 1986).

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1 A finding of such exceptional circumstances requires that the Court evaluate both the likelihood  
 2 of success on the merits and the plaintiff's ability to articulate his claims in *pro se* in light of the  
 3 complexity of the legal issues involved. Neither factor is dispositive, and both must be viewed together  
 4 in making a finding. *Terrell v. Brewer*, 935 F.2d 1015, 1017 (9<sup>th</sup> Cir. 1991)(citing *Wilborn, supra*, 789  
 5 F.2d at 1331). The district court has considerable discretion in making these findings. The court will not  
 6 enter an order directing the appointment of counsel. As discussed below, there is no likelihood of success  
 7 on the merits. Plaintiff's motion for the appointment of counsel is denied.

## 8 **II. Screening Standard**

9 Pursuant to the Prisoner Litigation Reform Act (PLRA), federal courts must dismiss a prisoner's  
 10 claims, "if the allegation of poverty is untrue," or if the action "is frivolous or malicious," "fails to state  
 11 a claim on which relief may be granted," or "seeks monetary relief against a defendant who is immune  
 12 from such relief." 28 U.S.C. § 1915(e)(2). A claim is legally frivolous when it lacks an arguable basis  
 13 either in law or in fact. *Nietzke v. Williams*, 490 U.S. 319, 325 (1989). The court may, therefore, dismiss  
 14 a claim as frivolous where it is based on an indisputably meritless legal theory or where the factual  
 15 contentions are clearly baseless. *Id.* at 327. The critical inquiry is whether a constitutional claim, however  
 16 inartfully pleaded, has an arguable legal and factual basis. *See Jackson v. Arizona*, 885 F.2d 639, 640 (9<sup>th</sup>  
 17 Cir. 1989).

18 Dismissal of a complaint for failure to state a claim upon which relief may be granted is provided  
 19 for in Federal Rule of Civil Procedure 12(b)(6), and the court applies the same standard under Section  
 20 1915(e)(2) when reviewing the adequacy of a complaint or amended complaint. Review under Rule  
 21 12(b)(6) is essentially a ruling on a question of law. *See Chappel v. Laboratory Corp. of America*, 232  
 22 F.3d 719, 723 (9<sup>th</sup> Cir. 2000). A complaint must contain more than a "formulaic recitation of the  
 23 elements of a cause of action;" it must contain factual allegations sufficient to "raise a right to relief above  
 24 the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 1965 (2007). "The  
 25 pleading must contain something more...than...a statement of facts that merely creates a suspicion [of]  
 26 a legally cognizable right of action." *Id.* In reviewing a complaint under this standard, the court must

1 accept as true the allegations of the complaint in question, *Hospital Bldg. Co. v. Rex Hospital Trustees*,  
 2 425 U.S. 738, 740 (1976), construe the pleading in the light most favorable to plaintiff and resolve all  
 3 doubts in the plaintiff's favor. *Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969).

4 Allegations in a *pro se* complaint are held to less stringent standards than formal pleadings drafted  
 5 by lawyers. *See Hughes v. Rowe*, 449 U.S. 5, 9 (1980); *Haines v. Kerner*, 404 U.S. 519, 520-21 (1972)  
 6 (*per curiam*); *see also Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). All or part  
 7 of a complaint filed by a prisoner may be dismissed *sua sponte*, however, if the prisoner's claims lack an  
 8 arguable basis either in law or in fact. This includes claims based on legal conclusions that are untenable  
 9 (*e.g.* claims against defendants who are immune from suit or claims of infringement of a legal interest  
 10 which clearly does not exist), as well as claims based on fanciful factual allegations (*e.g.* fantastic or  
 11 delusional scenarios). *See Neitzke*, 490 U.S. at 327-28; *see also McKeever v. Block*, 932 F.2d 795, 798  
 12 (9th Cir. 1991).

13 To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained  
 14 of was committed by a person acting under color of state law; and (2) that the conduct deprived the  
 15 plaintiff of a federal constitutional or statutory right." *Hydrick v. Hunter*, 466 F.3d 676, 689 (9<sup>th</sup> Cir.  
 16 2006).

### 17 **III. Instant Complaint**

18 Plaintiff, who is incarcerated at Ely State Prison has sued the State of Nevada, numerous state  
 19 and federal judges, state district attorneys and public defenders, Clark County, Nevada clerk's office  
 20 personnel and court reporters. While the complaint is difficult to decipher, plaintiff appears to challenge  
 21 his sentence as "improper" and illegal. For the reasons discussed below, plaintiff's complaint is  
 22 dismissed.

23 First, while plaintiff names the State of Nevada as a defendant, states are not persons for purposes  
 24 of § 1983. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 69 (1997); *Will v. Mich. Dep't*  
 25 *of State Police*, 491 U.S. 58, 71 (1989); *Doe v. Lawrence Livermore Nat'l Lab.*, 131 F.3d 836, 839 (9<sup>th</sup>  
 26 Cir. 1997); *Hale v. Arizona*, 993 F.2d 1387, 1398 (9<sup>th</sup> Cir. 1993) (en banc); *Gilbreath v. Cutter*

1 *Biological, Inc.*, 931 F.2d 1320, 1327 (9<sup>th</sup> Cir. 1991). Section 1983 claims against states, therefore, are  
 2 legally frivolous. *See Jackson v. Arizona*, 885 F.2d 639, 641 (9<sup>th</sup> Cir. 1989), superseded by statute on  
 3 other grounds as stated in *Lopez v. Smith*, 203 F.3d 1122, 1130 (9<sup>th</sup> Cir. 2000) (*en banc*). Accordingly,  
 4 all claims against the State of Nevada are dismissed with prejudice. The State of Nevada is dismissed  
 5 from this action.

6 Next, all of the other defendants are immune from suit based on the principles of either absolute  
 7 or qualified immunity. With respect to judges: “[c]ourts have extended absolute judicial immunity from  
 8 damage actions under 42 U.S.C. § 1983 not only to judges but also to officers whose functions bear a  
 9 close association to the judicial process.” *Demoran v. Will*, 781 F.2d 155, 156 (9<sup>th</sup> Cir. 1986). “Judges  
 10 and those performing judge-like functions are absolutely immune from damage liability for acts performed  
 11 in their official capacities.” *Ashelman v. Pope*, 793 F.2d 1072, 1075 (9<sup>th</sup> Cir. 1986) (*en banc*); *see also*  
 12 *Miller v. Davis*, 1142, 1145 (9<sup>th</sup> Cir. 2008); *Partington v. Gedan*, 961 F.2d 852, 860 n.8 (9<sup>th</sup> Cir. 1992);  
 13 *Houghton v. Osborne*, 834 F.2d 745, 750 (9<sup>th</sup> Cir. 1987). Judges retain their immunity when they are  
 14 accused of acting maliciously or corruptly, *see Mireles v. Waco*, 502 U.S. 9, 11 (1991) (*per curiam*);  
 15 *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Meek v. County of Riverside*, 183 F.3d 962, 965 (9<sup>th</sup>  
 16 Cir. 1999); *Tanner v. Heise*, 879 F.2d 572, 576 (9<sup>th</sup> Cir. 1989), and when they are accused of acting in  
 17 error, *see Meek*, 183 F.3d at 965; *Schucker v. Rockwood*, 846 F.2d 1202, 1204 (9<sup>th</sup> Cir. 1988) (*per*  
 18 *curiam*); *Ashelman*, 793 F.2d at 1075. Magistrate judges are entitled to absolute judicial immunity from  
 19 § 1983 damage actions. *See Tanner*, 879 F.2d at 576-78; *Ryan v. Bilby*, 764 F.2d 1325, 1328 n.4 (9<sup>th</sup>  
 20 Cir. 1985); *see also Atkinson-Baker & Assocs., Inc. v. Kolts*, 7 F.3d 1452, 1454-55 (9<sup>th</sup> Cir. 1993)  
 21 (extending judicial immunity to special masters).

22 With respect to the district attorneys named as defendants: prosecutorial immunity protects  
 23 eligible government officials when they are acting pursuant to their official role as advocate for the State  
 24 performing functions “intimately associated with the judicial phase of the criminal process.” *Imbler v.*  
 25 *Pachtman*, 424 U.S. 409, 430 (1976); *see also Kalina v. Fletcher*, 522 U.S. 118, 124-26 (1997); *Botello*  
 26 *v. Gammick*, 413 F.3d 971, 975 (9<sup>th</sup> Cir. 2005); *Genzler v. Longanbach*, 410 F.3d 630, 636-37 (9<sup>th</sup> Cir.

2005); *KRL v. Moore*, 384 F.3d 1105, 1110 (9<sup>th</sup> Cir. 2004); *Broam v. Bogan*, 320 F.3d 1023, 1028 (9<sup>th</sup> Cir. 2003). Prosecutorial immunity does not extend to those actions of a prosecutor that are “administrative” or “investigative” in nature. *See Hartman v. Moore*, 547 U.S. 250, 261-62 n.8 (2006); *Buckley v. Fitzsimmons*, 509 U.S. 259, 271-73 (1993); *Botello*, 413 F.3d at 975-76; *Genzler*, 410 F.3d at 636. State prosecutors are entitled to absolute prosecutorial immunity for acts taken in their official capacity. *See Kalina v. Fletcher*, 522 U.S. 118, 123-25 (1997); *Buckley v. Fitzsimmons*, 509 U.S. 259, 269-70 (1993); *Imbler*, 424 U.S. at 427, 430-31; *Botello*, 413 F.3d at 975; *Genzler*, 410 F.3d at 636; *KRL*, 384 F.3d at 1110; *Broam*, 320 F.3d at 1028.

With respect to the remaining defendants—public defenders, clerk’s office personnel and court reporters: government officials enjoy qualified immunity from civil damages unless their conduct violates “clearly established statutory or constitutional rights of which a reasonable person would have known.” *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Saucier v. Katz*, the Supreme Court provided guidance on the application of qualified immunity, explaining that officials are entitled to qualified immunity unless (1) plaintiff alleges facts that show a constitutional violation and (2) it was clearly established at the time of the alleged violation that the conduct was unconstitutional. 533 U.S. 194, 201 (2001). The Supreme Court stressed that the first part of the analysis is the threshold question that courts should address before proceeding to the second part. *Id.* at 207.

Plaintiff claims only that his sentence is improper and illegal. The judges and prosecutors named as defendants have absolute immunity from this suit. The remaining defendants listed above are entitled to qualified immunity from suit based on plaintiff’s allegations. Accordingly, all other defendants in this action aside from the State of Nevada are dismissed based on either absolute or qualified immunity.

Moreover, regarding plaintiff’s allegations that his sentence is improper and illegal, when a prisoner challenges the legality or duration of his custody, or raises a constitutional challenge which could entitle him to an earlier release, his sole federal remedy is a writ of *habeas corpus*. *Preiser v. Rodriguez*, 411 U.S. 475 (1973); *Young v. Kenny*, 907 F.2d 874 (9<sup>th</sup> Cir. 1990), *cert. denied* 11 S.Ct. 1090 (1991). Moreover, when seeking damages for an allegedly unconstitutional conviction or imprisonment, “a §

1 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged  
2 by executive order, declared invalid by a state tribunal authorized to make such determination, or called  
3 into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254.” *Heck v.*  
4 *Humphrey*, 512 U.S. 477, 487-88 (1994). “A claim for damages bearing that relationship to a conviction  
5 or sentence that has not been so invalidated is not cognizable under § 1983.” *Id.* at 488. Plaintiff appears  
6 to challenge the fact of his conviction. His sole federal remedy for such claims is a writ of *habeas corpus*.  
7 Accordingly, his claims are also subject to dismissal on that basis.

8 Because amendment would be futile, the entire complaint is dismissed without leave to amend.

#### 9 **IV. Conclusion**

10 **IT IS THEREFORE ORDERED** that plaintiff's application to proceed *in forma pauperis*  
11 (Docket #1) without having to prepay the full filing fee is **GRANTED**; plaintiff shall not be required to  
12 pay an initial installment fee. Nevertheless, the full filing fee shall still be due, pursuant to 28 U.S.C. §  
13 1915, as amended by the Prisoner Litigation Reform Act of 1996. The movant herein is permitted to  
14 maintain this action to conclusion without the necessity of prepayment of fees or costs or the giving of  
15 security therefor. This order granting *in forma pauperis* status shall not extend to the issuance of  
16 subpoenas at government expense.


17 **IT IS FURTHER ORDERED** that, pursuant to 28 U.S.C. § 1915, as amended by the Prisoner  
18 Litigation Reform Act of 1996, the Nevada Department of Corrections shall pay to the Clerk of the  
19 United States District Court, District of Nevada, 20% of the preceding month's deposits to the account  
20 of Delask Pittman, **Inmate No. 58318** (in months that the account exceeds \$10.00) until the full \$350  
21 filing fee has been paid for this action. The Clerk shall send a copy of this order to the attention of Albert  
22 G. Peralta, Chief of Inmate Services for the Nevada Department of Prisons, P.O. Box 7011, Carson City,  
23 NV 89702.

24 **IT IS FURTHER ORDERED** that, even if this action is dismissed, or is otherwise unsuccessful,  
25 the full filing fee shall still be due, pursuant to 28 U.S.C. §1915, as amended by the Prisoner Litigation  
26 Reform Act of 1996.

**IT IS FURTHER ORDERED** that plaintiff's motion for the appointment of counsel (Docket s **DENIED.**

**IT IS FURTHER ORDERED** that the following motions: “Motion Requesting for Permission to File a Petition for Habeas Corpus that is Longer than Normal Petitions” (Docket # 1-1); “Motion for Enter Order Ordering the Improper County Court Clerk Office to Provide this Court with the Attached Requested Documents for this Court Proceeding (Docket #1-4); “Motion of Notice” (Docket # 1-5); “Motion for an Order of Summary Judgment, Motion for Filing, and Motion to Proceed In Forma Pauperis” (Docket #3) are all **DENIED**.

DATED this 11<sup>th</sup> day of August, 2010.

  
UNITED STATES DISTRICT JUDGE